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DOCKETS

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

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Petition of

UNITED PARCEL SERVICE CO.
(DHL Airways, Inc.)

Docket OST-2002-13089-7

**MOTION OF DHL AIRWAYS FOR LEAVE TO FILE
AN OTHERWISE UNAUTHORIZED DOCUMENT AND SURREPLY**

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September 26, 2002

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UNITED PARCEL SERVICE CO.)
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On May 1, 2002, following a thorough review of extensive information relating to the reorganization in ownership and management of DHL Airways, Inc. ("Airways"), the Department of Transportation notified Airways that it continues to satisfy the statutory citizenship requirements applicable to U.S. carriers.¹ This determination reflected the Department's detailed examination of documents (including sensitive corporate and financial information) and interviews of officers, directors, and employees of the reorganized company.

¹ To the extent necessary, Airways requests leave to file this response to UPS's latest unauthorized attack on Airways's citizenship. Although denominated a "Reply," the UPS pleading is replete with entirely new, albeit wholly specious, allegations relating to Airways's citizenship. These latest allegations could, and should, have been included in UPS's original Petition filed on August 9, 2002, and would have been addressed in the Airways answer filed on September 6, 2002. Having been denied the opportunity to respond in a timely manner by UPS's tactics, considerations of due process and fundamental fairness dictate that Airways be allowed to file this response.

United Parcel Service Co. ("UPS") presumably would have reached a different conclusion—regardless of the facts—if it, rather than the Secretary of Transportation, had been empowered by Congress to determine whether a certificated air carrier continues to meet applicable "fitness" requirements for the provision of air transportation. Undeterred by the fact that Congress has wisely not seen fit to involve competitors in making continuing fitness determinations, UPS, on August 9, 2002, filed yet another petition, this time demanding that a full on-the-record evidentiary hearing be held before an administrative law judge to evaluate the citizenship of Airways. The filing was one further step in a continuing pattern of apparent harassment in which UPS seizes (or invents) every possible regulatory opportunity to undermine Airways's ability to operate domestic air freight service in support of the DHL network (and other customers) in the United States, service that offers direct competition to the UPS network.

The latest twist in this drama is the filing, on September 17, 2002, of yet another unauthorized document -- this time styled a "Reply." In the document, UPS -- seeking to second-guess the Secretary's discharge of his statutory responsibility -- reiterates its call for a full evidentiary hearing before an administrative law judge ("ALJ") to determine Airways's citizenship, a determination that the Department already has made using its long-established and entirely appropriate investigative procedures. UPS's demand is inconsistent with the statute—which provides an opportunity for a public hearing in connection with

an *application for a certificate of public convenience and necessity*,² but not in connection with a periodic *review of a carrier's continuing fitness* once a certificate has been issued. It also is inconsistent with the Department's regulations—which distinguish between applications for new or amended certificate authority, on the one hand, and information filed in support of a certificated carrier's continuing fitness to operate under its existing authority, on the other.³

Moreover, as demonstrated by the cases cited in the Consolidated Answer of Airways filed on September 6, 2002, UPS's insistence that an evidentiary hearing before an ALJ be scheduled is a radical departure from the Department's long-standing practice --supported by sound public policy factors⁴-- of conducting a non-public informal investigation (without an evidentiary hearing) to evaluate a carrier's continuing fitness when there has been a substantial change in ownership or management. To be sure, there have been instances when hearings on *initial license applications* have been held. This was true, for example, in the *Discovery*

² See 49 U.S.C. § 41108(b).

³ See 14 C.F.R. § 204.5(c).

⁴ These factors include administrative convenience (literally scores of ownership, management, and operational changes are reviewed by the Department annually), protection of sensitive commercial and financial information from public disclosure (informal procedures protect competitors from having to lay out sensitive operational and financial plans), due process (affording operating entities protection during investigations by Department staff) and fundamental fairness (by their nature continuing fitness inquiries are not adversarial or adjudicatory in nature and allowing competitors to participate in the process could lend itself to manipulation and anti-competitive strategic behavior). What the Department is doing here is evaluating compliance with the statute, a purely investigative function that properly should be conducted using non-public procedures.

Airways and *ATX* cases⁵ cited in the UPS Reply. But, to our knowledge, the Department has never held an on-the-record evidentiary hearing in a case involving fitness reviews stemming from changes in ownership, management and operations which had been reported to the Department.⁶ Thus, UPS wants to break new ground here by insinuating itself into the process of making a compliance determination that Congress has reserved for the Department. This it may not do.

UPS seems to believe that it can claim a right to an oral evidentiary hearing simply by incanting repeatedly that there exist disputed issues of material fact. Such claim is clearly pretextual, however. All of the relevant facts are well known to the Department as a direct result of its informal review of Airways's citizenship – a review that was based on the most complete and up-to-date information regarding the ownership, management, operating arrangements and business relationships of the re-organized airline. Nothing is in dispute here other than UPS's claim that it has a right to substitute its judgment for that of the Department.

⁵ See *Application of Discovery Airways*, Order 90-1-60 (Jan. 29, 1990); *ATX, Inc. Fitness Investigation*, Order 94-4-8 (April 5, 1994).

⁶ KLM's purchase of an interest in Northwest Airlines to which UPS refers on page 9 of its Reply was a consent order entered by the Department after an informal review of Northwest's citizenship, the same type of informal review the staff has undertaken here. So that citation is not on point. Nor is the matter involving British Airways's proposed acquisition of interests in US Air, also cited on page 9 of UPS's Reply. In that case, the Department opened a public docket to receive comments on the proposed transaction but did not conduct an on-the-record evidentiary hearing. On some occasions, the Department has issued written decisions memorializing its findings in a fitness review, but that is a long way from conducting an on-the-record adjudicatory proceeding as a predicate to making a fitness determination.

For example, the Department was fully aware of the facts underlying Airways's Form 41 Report to which UPS refers in its Reply and correctly concluded that Airways's contractual relationship with DHL Worldwide Express does not establish that DHL Holdings controls Airways.⁷ Similarly, UPS's reference to Airways and DHL Worldwide Express having common office space, legal counsel, and consultants⁸ confuses the situation prior to the reorganization (when the ground company and Airways were part of a single corporate entity) with the

⁷ Not surprisingly given the nature of the company being reorganized, DHL Holdings will be Airways's major customer at the outset of its independent existence. But DHL Holdings' ability to influence Airways is limited, since the business relationship is embodied in a long-term contract that Holdings cannot simply terminate at will. Moreover, by the same logic, one could just as readily say that Airways has effective control over Holdings, since the latter is dependent on Airways for air lift services in the U.S. In any event, this non-exclusive contract does not preclude Airways from seeking to expand its business with other customers, and that is precisely what Airways has been doing. In these and other respects, the present case differs significantly from *Executive Air Fleet, Inc.*, Consent Order, Order 92-9-46 (1992)—where the two companies involved shared the same offices and had overlapping corporate officers, and where the new owner of the air carrier had virtually no contact with the business—and from *Air-Evac Ambulance, Inc.*, Order 95-3-3 (1995)—where the controlling shares of a small on-demand air taxi were held in trust for the benefit of a non-citizen's minor daughter (a U.S. citizen), with the lawyer for the non-citizen father acting as trustee. Further indicia that the airline lacked independence in that case were the fact that its only customer was a corporation controlled by the non-citizen father, which had an exclusive contract with the airline, and the fact that the lawyer acting as trustee for the trust also served as counsel to both corporations. These cases have little to do with the situation resulting from the reorganization of the original DHL Airways into separate air and ground companies with different owners, officers, directors, offices, and counsel. Indeed, in the *Executive Air Fleet* case, after some restructuring of the company to increase its independence from its former parent, the Department found the company to be in compliance with the statute's citizenship requirement, the same conclusion the Department reached here. Thus, if the case has an relevance here at all, it stands for the proposition that a single company can be separated into two distinct business -- one a citizen and one not under the statute -- and continue to do business with each other, the very outcome UPS now complains against.

⁸ See UPS Reply at 6-7.

situation following the reorganization (when separate corporations with separate offices, legal counsel, and consultants were established). By the same token, the fact that Airways continues to use the DHL name⁹—which it did prior to the reorganization as well—is not a basis for questioning its independence. This claim is particularly disingenuous coming from UPS, which operates extensive co-branded services utilizing in some cases aircraft of foreign-owned and controlled carriers to transport freight throughout Europe and the rest of the world.¹⁰

Finally, the “host of significant questions” that UPS purports to raise about William Robinson’s ownership of Airways¹¹ can only be described as speculative. The Department’s investigation included a thorough review of the confidential, operative corporate documents, the nature of the financial transactions, and the sources of funds for purchase of the reorganized company—so the Department is well aware that Mr. Robinson made a large personal investment to become the majority shareholder of Airways and has a strong financial interest in its success. While the Department had a legitimate interest in reviewing this sensitive and proprietary information relating to a non-publicly held corporation, there is no reason why it should be spread across the public record in an evidentiary hearing to

⁹ See UPS Reply at 7.

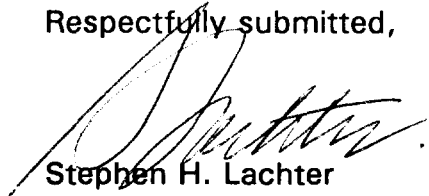
¹⁰ For example, Airways understands that StarAir AS, a Danish carrier, has operated aircraft in Europe in support of UPS’s global air express network painted in the UPS livery.

¹¹ See UPS Reply at 8.

satisfy the almost prurient interest of a competitor or to provide that competitor an advantage in the marketplace.

In sum, the UPS Reply presents no relevant information of which the Department was unaware when it made its determination regarding Airways's citizenship, using an investigative procedure that has been employed for decades. UPS's self-serving request that the Department revisit this determination by instituting an on-the-record evidentiary hearing before an ALJ is an undisguised anti-competitive ploy that should be firmly rejected.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "S. Lachter", is written over the typed name.

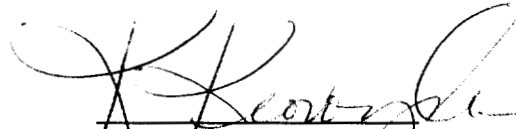
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September 26, 2002

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing Motion of DHL Airways for Leave to File an Otherwise Unauthorized Document and Surreply this 26th day of September, 2002 by first class mail, postage prepaid to all persons on the attached Service List.



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